SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 391

E. E. ASHCRAFT AND JOHN WARE,
Petitioners,

vs.

THE STATE OF TENNESSEE.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF TENNESSEE.

BRIEF OPPOSING ISSUANCE OF WRIT.

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MAY IT PLEASE THE COURT:

The petition presents an effort on the part of the petitioners to review a judgment of the Supreme Court of Tennessee affirming a conviction of the Criminal Court of Shelby County, Tennessee, convicting petitioner Ware of murder, and petitioner Ashcraft, of being an accessory before the fact to such murder, and sentencing each of them to ninety-nine years' confinement in the State prison.

The only question relied upon consists of the contention on the part of petitioners that a confession of each, made

separately, was extorted from them by unlawful means, and that the introduction thereof against them constituted a deprivation of due process of law under the Fourteenth Amendment. So far as the contention is made that the introduction of such confessions deprived them of due process of law, the respondent concedes that the same presents a Federal question, under repeated decisions of this Court, and that the same was made seasonably in the State Courts. There is another contention on behalf of petitioner Ashcraft to the effect that the Trial Judge in submitting the case to the jury did not submit to that body the question as to whether or not the confession was extorted, thereby depriving him of due process of law, but the respondent neither concedes that the same presents a substantial Federal question, nor that the same was interposed in a timely manner, but on the contrary, insists that neither of such positions are well taken.

Since this Court has definitely held that where it be insisted that the introduction of a confession alleged to have been extorted by unlawful means is claimed, it will make its own examination of the record in such connection, and decline to be completely bound by the finding of the State Court upon this question (*Lisenba* v. *Calif.*, 314 U. S. 219), a somewhat detailed statement of facts becomes thereby necessitated. References to the pages of the transcript refer to the pages as they appear in the copy of the typewritten transcript furnished counsel for the respondent by counsel for the petitioners.

Statement of the Case.

Petitioner Asheraft is a white man apparently in his forties, while petitioner Ware seems to be an illiterate negro, twenty-one years of age. Ware at the time of the homicide was employed upon a construction project upon which Asheraft was likewise employed. The deceased was

the wife of petitioner Ashcraft. The record indicates that due to operations she had become extremely nervous, and that the situation became rather unbearable for Ashcraft. He had offered her a substantial property settlement if she would procure a divorce, but she refused.

In June, 1941, her dead body was found floating in a body of water near the city of Memphis. Ostensibly, she had left home early that morning in their automobile to visit her mother in Kentucky. The car was parked on a highway near the side of this pool of water. An examination of the body disclosed that she had been struck in the head with some type of blunt instrument. Part of the contents of the car had been disarranged so as to give the appearance of robbery.

Immediately the authorities of Shelby County began an investigation of the crime. They contacted the petitioner Ashcraft, and obtained from him a number of statements, of which no complaint is made. As the investigation progressed for approximately ten days, the authorities became increasingly convinced of the untruthfulness of these statements as being contradicted by the physical facts. Careful study of the situation increasingly convinced the authorities that there had been no robbery of the deceased.

Upon Saturday evening June 14th, the authorities in charge of the investigation sent an officer and took Ashcraft into custody, carrying him to the Shelby County jail, where he was taken to a room upon the fifth floor. Since the obtaining of the challenged confessions are separate charges, it will be better to treat them separately.

(a) Ashcraft. There are certain disputed facts in connection with the confession of petitioner Ashcraft, and others which are not disputed. Briefly, that any violence, threats or deprivation of food and water was had, is definitely disputed. That Ashcraft was kept in this room from

about seven P. M. on Saturday, June 14th, until about eleven P. M. on Sunday, June 15th, or a period of some twenty-eight hours is not controverted in the record. Likewise, it is not controverted in the record that petitioner Ashcraft was not advised of his statutory right to counsel nor was he warned of his right against self incrimination.

That Ashcraft was fed, is definitely testified to by the officers who had charge of the investigation Tr. p. 27; Tr. p. 39, p. 60. That he was permitted to go to the toilet and to have water when he so desired, is likewise definitely testified to by them Tr. p. 114; Tr. p. 393. Likewise, that he was permitted to smoke, and to have coffee when he desired it is also testified to by the officers Tr. p. 121.

All of the officers definitely testify that the threats and extortions which Ashcraft claims were made to him or toward him were not made Tr. p. 388; Tr. p. 389; Tr. p. 392. Likewise there is testimony that the light in this room which Ashcraft claims paralyzed his vision was an ordinary light over a desk, and it is also testified that there were no shades over the windows of this room so as to increase the intensity of such light Tr. p. 393.

Likewise, the record contains a statement by petitioner Ashcraft to his family physician that he had been treated all right Tr. p. 166.

As above stated, the questioning of Petitioner Ashcraft began about seven P. M., and about eleven P. M., the testimony is to the effect that after the officers had recounted to him his various statements which investigation had proven untrue, he made the statement to them that he realized that the circumstances all pointed toward him, and that he had no explanation for them Tr. p. 27; Tr. p. 88. Thereupon the officers accused him of the murder of the deceased, which he denied.

As above stated, he was retained in this room at the Shelby County Jail and questioned by various relays of

officers until about eleven P. M. upon Sunday night. According to the testimony of the officers, about eleven P. M. on Sunday night, while he was being questioned by Becker, he asked Becker if he might talk to Ezell, another of the officers who had participated in the investigation. Ezell was sent for, and according to his testimony, Ashcraft said that he wanted to tell the truth, and that a negro by the name of Tom Ware, or John Ware had killed his wife Tr. p. 60. Ashcraft's explanation for withholding this information from the officers was that he was afraid that the negro would burn his house down if he informed the officers of this crime. Becker was called in, and to him Ashcraft related the same story Tr. p. 60; Tr. p. 28. The record shows definitely that this was the first time that Ware's name had been mentioned in connection with the crime.

Ashcraft was then asked if he knew where Ware lived, and when he informed the officers that he could show them, he was taken in an automobile with the officers, and they proceeded to a negro settlement in Memphis where Ware lived. After an entry into the wrong house, occasioned no doubt by Ashcraft's unfamiliarity with that section of the city, Ware was arrested and taken to the jail, and he and Ashcraft were placed in the same room.

When Ashcraft was confronted with Ware, the latter was asked if he knew Ashcraft, and at once said that he did Tr. p. 61. Ware was thereupon asked as to the date of the last occasion upon which he had ridden to work with Ashcraft. Ashcraft undertook to prompt him as to the date, and thereupon, according to the officers, Ware turned to them and asked them if they wanted the truth, and when an affirmative answer was had from the investigating officers, their testimony is that he turned to Ashcraft and said in substance that he had told him "when this thing hap-

pened that if anything come of it, I wasn't going to take the whole blame on myself" Tr. p. 31; Tr. p. 67.

All of the officers testified that thereupon Ashcraft was taken to another room, and that Ware made to them the statement that he had been employed by Ashcraft to kill the deceased. The record indicates substantially that Ware had not been in the County jail for more than ten minutes before he made the statement in question. That this is substantially correct is corroborated by the testimony of Mr. Waldauer, a court reporter who was called in for the purpose of taking down and transcribing these confessions. His testimony is that he was notified by telephone about 1:40 A. M. to come to the jail. When proper allowances be made for the time requisite to find Ware and to give his story, it is obvious that Ware was not held for any appreciable length of time before his confession was made.

Ashcraft, under the testimony, seems to have been ignored temporarily from that point until approximately six A. M. The testimony indicates that he was held in what is known as the theft squad room of the jail, while all attention was centered upon the taking and transcribing of the confession of Ware. In the meantime, Dr. McQuiston, who under the record appears to be as near the family physician of Ashcraft as he could be said to have had, was called to the jail for the purpose of making a physical examination of Ashcraft, in anticipation of his claim that he had been mistreated.

Doctor McQuiston testifies that (1) Ware's statement as transcribed by the court reporter was read to him, and that he assented to its correctness, and signed it by his mark Tr. p. 61. He likewise testified that he examined Ware physically and found no evidence of any physical mistreatment Tr. p. 160. Dr. McQuiston testifies that it was perhaps five A. M. when he arrived at the jail Tr. p. 164. He likewise testifies that he saw Ashcraft and made a physical examina-

tion of him, and that in his presence Ashcraft made the statement that he had not been able to get along with the deceased, and that he had offered Ware a sum of money to make away with the deceased Tr. p. 161, 162. Doctor McQuiston testifies that at the time Ashcraft made no complaint about any mistreatment of any type, that he appeared normal, that his eyes were not blood-shot, and that he showed no signs of being unable to read Tr. p. 161.

After Ware's statement was shown to Ashcraft, the testimony on behalf of the State is that Ashcraft made a statement admitting his part in the homicide of the deceased, and that the statement was taken down by Waldauer and transcribed, but that when it was transcribed, Ashcraft declined to sign it saying that he wouldn't sign it until he had had an opportunity to consult a lawyer Tr. p. 183; Tr. p. 75.

In the meanwhile, two reputable business men of the city of Memphis, Mr. Castle and Mr. Pidgeon, had been called in to witness the confessions. They both testify that Ashcraft made the statements in question in their presence, and that when they were read to him he assented to their correctness, but declined to sign it Tr. p. 208; Tr. p. 230. Mr. Pidgeon testifies that Ashcraft looked very cool and collected and did not look tired Tr. p. 231. Mr. Castle testifies that Ashcraft looked in good physical condition to him, and that there was no evidence about his eyes or otherwise to show any tiredness Tr. p. 207.

Upon the trial Ashcraft stubbornly maintained that he had made no confession whatsoever, nor had any part in the homicide of his wife, and that the only reference which he had made to Ware was when the officers inquired of him as to who had been riding with him upon his way to work, and that when he mentioned Ware's name, the officers immediately took him to Ware's house to locate the latter.

(b) Ware. Ware admits making the confession introduced in evidence, but insists that before he made it he was placed

in a padded cell, and likewise was threatened by the officers with mob violence in case he declined to make a confession. The officers deny that handcuffs were placed upon Ware, or that he was threatened with a mob, or that any force or threats were used against him Tr. p. 37; Tr. p. 388, 396. Mr. Waldauer, the court reporter, who was a Notary Public and before whom Ware's written statement was sworn to, testifies that he explained to Ware at that time that he was not obliged to sign this statement unless he wanted to Tr. p. 177.

As above stated, it is undisputed that Ashcraft was held from seven P. M. until eleven P. M. the following night without a warrant having been sworn out for him, and that he was not notified of his statutory right to counsel, or his constitutional right against self incrimination.

BRIEF.

1.

Any asserted denial of due process must be tested by an appraisal of the totality of the facts in the given case.

Betts vs. *Brady*, 316 U. S. 455;
Lisenba vs. *Calif.*, 314 U. S. 219.

2.

While the Court will make an independent appraisal of the facts in cases where if be alleged that the introduction of a confession deprived the accused of due process of law, there is a presumption of the correctness of the findings of the State Court, especially where the evidence be conflicting, unless such findings have substantially no support in the evidence. *Lisenba* vs. *California, supra.*

3.

McNabb v. *U. S.*, 319 U. S. —, 63 Sup. Ct. 608; and *Anderson, et al.* v. *U. S.*, 319 U. S. —, 63 Sup. Ct. 599, do not formulate a procedural rule that is obligatory upon State Courts, but are limited to proceedings in courts of the United States.

4.

Especially is this true since in the present case the Supreme Court of Tennessee has held that the detention of petitioner Ashcraft was not unlawful under its statutes, and that they do not demand the immediate arraignment of one accused of crime.

5.

The construction of state statutes placed upon such statutes by the court of last resort of the State will be accepted by this Court.

Watson v. *Buck*, 313 U. S. 387;
Hartford Insurance Company v. *Nelson*, 291 U. S. 352;
Supreme Lodge v. *Meyer*, 265 U. S. 30.

6.

The State does not deprive one accused of crime of due process by treating the question of admissibility of confessions as a mixed question of law and fact to be determined by the court alone without submission of the same to the jury, where the court of last resort of such state reviews the findings of the trial court in such matters.

Buchalter v. *N. Y.*, 319 U. S. —, 63 Sup. Ct., 1129.

7.

The rule in Tennessee has been for many years that the admissibility of confessions presents a question to be determined by the Court alone.

Boyd v. *State*, 21 Tenn. (2 Humph.), 39, 40.
Self v. *State*, 65 Tenn. (6 Bax.), 243, 253.
Beggarly v. *State*, 67 Tenn. (8 Bax.), 520.
Woodruff v. *State*, 164 Tenn. 530.

8.

Perhaps as many jurisdictions adhere to the common law rule that the admissibility of confessions is not a proper matter for submission to the jury as hold that they should be submitted to the jury.

See Wigmore on Evidence, 2nd Ed., Sec. 861 and notes thereto.

In such case it cannot be said that a state denies due process of law by adopting the rule sanctioned by such respectable authority.

Argument.

The Respondent respectfully insists that so far as the charges of physical violence and direct threats made by the Petitioner Ashcraft be concerned, it cannot be said by any means by this Court that the Supreme Court of Tennessee should have found in favor of his contention as to such physical mistreatment. In the first place, obviously the Petitioner Ashcraft is opposed by the numerical number of witnesses who testify. We frankly concede that the situation in this as well as the majority of cases is such that the accused when a confession be made is hardly in position to offer any great amount of corroborating testimony in his behalf, and were the case upon this feature dependent entirely upon such, a much more plausible contention might be made. But in the present case, the respondent respectfully insists that Ashcraft made no complaint to Mr. Waldauer, the Reporter, a completely disinterested witness, and one of varied experience. To Dr. McQuiston, who so far as the record goes is the only physician who has attended him since he has lived in Memphis, he made no complaint whatsoever, but upon the contrary, he made the affirmative statement that he had been treated fine. And likewise, in passing upon the question of credibility and the weight to be given to the statements of the Petitioner Ashcraft, the Respondent respectfully insists that the Trial Judge might well consider the fact that he was contradicted upon the question as to whether or not he made such a statement by both Mr. Castle and Mr. Pidgeon, neither of whom are interested in the slightest degree. It is perfectly true that their testimony hardly reflects upon any alleged mistreatment, but from the fact that he was contradicted by each of these disinterested witnesses upon so material a matter, the Trial Judge might well conclude that his credibility was below that of the parties testifying to the absence of such mistreatment.

It has been said by this Court in substance, that where the evidence be conflicting this Court will accept the determination of the triers of fact, unless it be so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process. *Lisenba* v. *Calif., supra.* The rule must be equally applicable where State procedure provides for a trial thereof by a court only, as distinguished from a finding by both court and jury.

With the emphatic denials of the officers contradicting the claim of the petitioner that such methods were used, with the petitioner himself contradicted by two witnesses, whose credibility is not assailed, and could not be, and with both the Trial Court and the Supreme Court of Tennessee finding in substance that no such so-called rough treatment was had, respondent respectfully insists that the judgment of the Supreme Court of Tennessee upon this phase of the admissibility of the confession is not so devoid of support in the evidence as to render it so fundamentally unfair as to make the constitutional guaranty of due process an empty shell.

There still remains the question as to the confinement of Ashcraft for approximately twenty-eight hours before any statement was obtained from him, during which time he was being continually questioned. Obviously, this is undisputed in the record. The respondent recognizes full well the force of the decisions of this Court, the most recent of which appears to be *Ward* v. *Texas,* 316 U. S. 547, wherein the earlier cases are collated.

However, the respondent respectfully insists that the present case does not go to the extent of falling within the authority of those cases. In substantially each of them, the person from whom the confession was extorted seems to have been an ignorant, illiterate, impecunious member of the colored race, but well recognizing that color will

have no effect upon the admissibility of such confessions, this Court has laid considerable stress upon the effects produced in the mind of a person confessing by a show of authority upon the part of those seeking to procure the confession. It stands to reason that the more ignorant and lowly of station the person be who is being subjected to such examination, the more terrified such person will become, to the point where fear dominates reason and will produce any type of story designed to relieve the mental pressure upon so weak an intellect.

In the present case however, the petitioner does not appear to be by any means illiterate or a person of weak mentality. He was of the dominant race in that community, and necessarily was hardly subject to the inferiority complex so often found in the minority race. That the Petitioner Ashcraft must be a person of considerable knowledge, can be inferred from the nature of his work, and certain it is that here was no ordinary member of the colored race to be terrified by an officer of the law, without any great degree of effort.

We recognize the fact that in a number of cases this Court has held that the continued questioning of persons accused of crime is sufficient to render such confession inadmissible. However, in each of these cases the questioning apparently has been of a more protracted nature than that found in the present case, and likewise, in each of such cases this Court has commented upon the unlawful nature of the actions of the officers in question. Regardless of the views which may be entertained by this Court as to the actions of the officers in question, the Supreme Court of Tennessee, whose duty it becomes to pass upon the conduct of such officers under the State statutes, expressly held in the present case that the detention of Petitioner Ashcraft was not unlawful under the Tennessee statutes, and that there was no unnecessary delay in arraigning him

before a committing officer. On the contrary, the Supreme Court of Tennessee in its opinion, affirmed the detention of the Petitioner Ashcraft as a temporary holding for examination purposes, and expressly held that such was not a committal to prison under the Tennessee statutes.

We respectfully insist that under the authorities quoted in the brief proper, the construction of the Tennessee statutes lies with the court of last resort of that state, and that such court, having passed upon the precise question in the present case, and having held that the detention of Petitioner Ashcraft was not unlawful under the Tennessee statutes, this Court is required to accept such decision, and to accord thereto that degree of respect which this Court gives to a decision of the court of last resort of the state construing the statutes of such state.

Likewise, it strikes the writer that in determining whether or not the will of the person in question has been so overpowered as to render such person incapable of asserting the slightest degree of will power, this Court will consider the condition prevalent at the time such confession be made, the ability of the party in question to think clearly and lucidly, their physical condition, and such other matters as are proper considerations at the hands of this court.

In the present case, so far as petitioner Ashcraft be concerned, it must be remembered that when the petitioner finally did make a statement to the officers, it was not a statement of guilt upon his part, but upon the contrary, it was a statement completely exonerating himself and placing the blame upon his co-petitioner. The statement first made by petitioner Ashcraft could have been introduced in evidence against him without the slightest danger of a conviction resulting to him from the introduction of such statement. Now we insist that such a statement is not the product of a mind over-awed by systematic and relentless questioning, as insisted by the petitioner, but upon the

contrary, it shows a complete recognition of the advantages to be attained by shifting the onus of the crime to the shoulders of another.

In the second place, the petitioner was examined by a physician who certainly could not be accused of unfriendliness toward him, and against whose qualifications and reputation no charge is leveled. This physician was unable to discover any physical injuries indicating mistreatment upon the body of the petitioner, and likewise his testimony is to the effect that petitioner appeared completely normal to him, and did not show any visible sign of the strain to which he claims that he had been subjected. Obviously complete domination of the will is seldom accomplished without its effect becoming visible from external sources.

But finally it would definitely appear that petitioner Ashcraft was completely in possession of his full faculties. All the witnesses testifying agree that when the typewritten confession was presented to him for his signature, he possessed sufficient shrewdness and ingenuity, as well as will power, to be able to decline to sign the same until he should have had an opportunity to consult with his lawyer about the propriety thereof. This one fact in itself certainly should be sufficient to negative the contention that the will power of the petitioner was exhausted, and that the confession was produced by the domination of the accusers.

Upon the contrary, the logical inference from the record is that Ashcraft realized, upon being confronted with his co-petitioner Ware, and hearing the remarks attributed to the latter, that Ware intended to make a clean breast of the entire matter, and that after he had this information and knowledge, he realized that no service to his own cause would be rendered by either a continuance of his own denials of any knowledge of his wife's death, or an insistence that Ware, and Ware alone, was responsible therefor.

So far as the insistence be made that the failure to caution the petitioner or to advise him of his right to counsel denied him due process, we would respectfully call to the attention of the Court the fact that in jurisdictions where no statutes have been enacted, and the matter has arisen, the overwhelming majority of such jurisdictions hold that a confession otherwise admissible is not invalid by the failure to caution the person confessing. The cases in question are collated in 16 C. J., p. 723-4 and supplemented in 22 C. J. S., pp. 1441-2, and will not be repeated here. We respectfully insist that where the overwhelming weight of authority, in the absence of a statute, be to the effect that a failure to warn or to advise as to the right of counsel will not render the confession inadmissible, due process is not thereby denied by such failure.

For the reasons above stated, we respectfully insist that the Supreme Court of Tennessee did not deny the petitioner due process in the admission of his alleged confession by the Trial Court.

Perhaps an explanation should be made of one matter upon which counsel for petitioners harp, and that is the testimony of Mr. Waldauer to the effect that the District Attorney General called him and informed him that Ashcraft was about to confess. It is substantially shown in the record that the District Attorney General was not present during the pre-confession conferences, and obviously such information as he had received must have been communicated to him by telephone, and in turn he called Waldauer. Under these circumstances, it is quite easy to see that there may have been a mistake in the message before it finally reached Waldauer at 1:40 A. M.

Perhaps at this point some note should be taken of the Tennessee statutes and cases relied on by petitioner Ashcraft. These statutes and cases relate to proceedings on the hearing before the magistrate. It is perfectly true that

in two cases, to-wit, the ones cited by petitioner, the Supreme Court of Tennessee has excluded confessions made upon a trial before a magistrate, because the defendant in such cases was not informed by the magistrate of his rights to counsel, and his right to make a statement. The statutes provide the duty of the magistrate in such cases, and where such duty has not been performed, the Supreme Court of Tennessee assiduously enforces the statutes. But these statutes and cases have no application to the present situation. Petitioner Ashcraft made no confession or statement in the nature thereof when arraigned before the magistrate, and the prosecution undertook to introduce no such statement. What it did undertake to introduce was a statement made earlier in the presence of numerous witnesses, taken down by the reporter with the transcription thereof completed, substantially an hour after his arraignment, and so the respondent respectfully insists that the State authorities relied upon by petitioner are not in point with reference to the facts of the particular case.

This then brings us to another line of authorities strenuously relied upon by the petitioner, to-wit, the recent case of *McNabb* v. *U. S., supra,* and its companion case of *Anderson, et al.* v. *U. S., supra.* A simple reading of the opinion in the *McNabb* v. *U. S., supra,* should be sufficient to demonstrate that it was not intended to lay down the rule announced in that case for the State Courts. On the contrary, the opinion expressly bases its holding upon the supervisory authority of the Supreme Court over the administration of criminal justice in the Federal Courts. Many difficulties suggest themselves when the effort to apply this doctrine to State Courts be considered. It is entirely possible that a state, in the exercise of sound discretion in the administration of criminal law, might conclude that arraignment prior to commitment is not desirable. In such case, the doctrine in question either would

not apply, or this Court would be placed in the attitude of requiring that a State enact legislation, which in the exercise of sound discretion it had considered unsuited to the administration of criminal law.

In the present case, the Supreme Court of Tennessee expressly held after consideration of the Tennessee statutes dealing with the duty to arraign, that there was no requirement obviating unnecessary delay, nor is there to be found any provision of law requiring such immediate arraignment before a magistrate, and in the present case the Supreme Court of Tennessee held that there was no unnecessary delay in arraigning the petitioners before the committing officer. Despite an apparent conflict between the holding in the present case and that in *State, ex rel.* v. *National Surety Company,* 162 Tenn. 547, the conflict is more apparent than real, because in *State, ex rel.* v. *National Surety Company, supra,* it was substantially assumed that the statutes required such immediate arraignment without a thorough consideration of such statutes. Be that as it may, the Supreme Court of Tennessee possesses that inherent privilege which characterizes all the better courts, to-wit, the right to reconsider its holding upon any principle of law, and to modify or change the same if in its opinion an erroneous result was reached by the prior holding.

Now, then, with no duty resting upon the officers under the laws of Tennessee as construed by its court of last resort in the present case, its latest holding upon the subject, it becomes obvious that there can be no application of the doctrine of *McNabb* v. *U. S., supra,* to the present case, without provoking that serious conflict between the judgment of each state expressing its idea of the proper policy to be followed in the administration of criminal justice, and the views of this Court as to the proper method to be followed in such administration in the Fed-

eral Courts where the situation may be radically at variance with that prevailing in the state in question.

For the reasons above stated, it is the respectful insistence of the respondent that so far as petitioner Ashcraft be concerned, the record discloses that he was completely in possession of his mental faculties at the time that he made the same, despite the protracted questioning to which he had been subjected, and that the confession emanated not as a result of any coercion of will produced by such protracted examination, but upon the contrary, from the realization that Ware had been apprehended, and had informed the authorities of Ashcraft's connection with the matter, and that the preponderance of the evidence in the transcript indicates that Ashcraft was completely normal, mentally and physically at the time of the making of such confession.

(2) Ware. The respondent respectfully insists that the facts in connection with the alleged confession of Ware are much more simple than those in connection with that of Ashcraft. In the first place, when Ashcraft informed the authorities that Ware had killed the deceased, they might then lawfully arrest Ware upon this charge, it being a felony, without the necessity of a warrant. *Code of Tennessee, Sec. 11536.* The arrest was made in all probability under the record, after midnight upon Monday morning. We say in all probability, because the testimony is not definite as to the exact time, but it is merely approximate. Having arrested Ware at this hour, they might lawfully lodge him in jail for safe keeping until the next morning when a magistrate might be found. *State, ex rel.* v. *National Surety Co., supra.* So therefore, beyond peradventure the arrest and detention of Ware were lawful, and it was so held by the Supreme Court in the present case.

The only other matters relied upon by Ware for the exclusion of the confession was his contention that he was

brutally mistreated by the officers after his arrest, and threatened. In the statement of facts, we have narrated the denials of the officers in this connection. Ware stands alone in his insistence of such threats and mistreatment, and he is directly contradicted by all of the investigating authorities who had occasion to come in contact with him. No doubt the trial Court who saw and heard the witnesses in person was able to form an accurate index and estimate as to their credibility, and the respondent respectfully insists that since the trial Court and the Supreme Court both found against these charges of mistreatment and threats, upon conflicting evidence, their findings cannot be said to be without substantial support in the evidence, and therefore they should be accepted by this Court under the doctrine of *Lisenbà* v. *Calif.*, *supra*.

Under the testimony, there was obviously no protracted questioning of petitioner Ware. While as above stated, the statements with reference to the time of the occurrence was indefinite, and but the estimate of the various witnesses, it is obvious from the record that it was approximately 11:00 P. M. upon this Sunday night in question before the name of Ware was brought into the investigation. The record indicates that it was approximately 1:00 A. M. when Ware was brought to the County Jail Tr. p. 31; Tr. p. 55. Mr. Waldauer testifies definitely that he was called at 1:40 A. M. to come to the jail and to take this confession, and so it would seem therefore beyond question that Ware confessed within a very short time after he was brought to the County Jail. The witnesses who testify on behalf of the prosecution say that he had not been in the building for more than ten minutes before he made the statement to Ashcraft, indicating he intended to narrate his part in this crime. It certainly therefore is obvious that Ware was subjected to no continuous questioning, but upon the contrary

that his confession was made in less than an hour after he had reached the jail. Therefore, we respectfully insist that so far as Ware be concerned, there was certainly no deprivation of due process which caused him to make this confession, but on the contrary, the sight of Ashcraft in custody of the officers was too much for his illiterate limited mentality, and concluding therefrom that his part in the crime was known, he proceeded to make the confession introduced in the present case.

The transcript as furnished to the writer does not contain the motion for new trial interposed by Ashcraft, and although the writer tried the case in the Supreme Court of Tennessee, his memory fails as to whether or not petitioner Ashcraft there made the insistence that the failure of the trial Judge to submit to the trial jury the question as to whether or not the confession of Ashcraft was involuntary, deprived him of due process of law, under the Federal Constitution. Of course if such contention was not made in the State Court, it cannot be made in this Court for the first time. The respondent insists that the rule is so well settled to the effect that before this Court obtains jurisdiction on appeals from State Courts, there must be a claim of federal rights made in the State Court, and decided adversely to the claim of such right, that no citation of authority is necessary for so well known a principle.

But should such claim of Federal right have been made seasonably in the State Court, the respondent insists that such is not well taken. As shown in the brief proper, the rule in question has been followed in Tennessee for many years. It likewise has the sanction of perhaps the leading text upon evidence in this country. The notes to Wigmore on Evidence 2nd Ed. 861, *supra* reveal that the same rule is prevalent in a number of jurisdictions. The respondent respectfully insists that so long as the question of the

voluntariliness of a confession be submitted to a judicial tribunal with the right of review accorded by the highest court of the state, there is no constitutional requirement that it be submitted likewise as an issue of fact to be passed upon by the jury trying the case. The trial Judge presumably is familiar with the admissibility of confessions, and presumably likewise more intelligent than the average juror, and therefore is much more capable of rendering a correct decision upon the law and facts than would be the average juror.

After all, the respondent respectfully insists that where there be two well defined methods of testing the validity of a confession, the one involving a submission to the trial jury, and the other omitting such submission, a state in the exercise of the right to determine appropriate means for the enforcement of its criminal laws, and for the administration of criminal justice may adopt either of such methods without thereby denying an accused of due process of law.

Analogous is the holding of this Court in *Lisenba v. State, supra,* where it was held that the Fourteenth Amendment leaves the states free to construe and apply its own laws with reference to the evidence of an accomplice, and likewise the rule of relevance with reference to the commission of other crimes.

In *Buchalter* v. *N. Y., supra,* in discussing the effect of the Fourteenth Amendment, this Court said:

> "It leaves the states free to enforce their criminal laws under such statutory provisions and common law doctrines as they deem appropriate, and does not permit a party to bring to the test of a decision in this Court for ruling made in the course of a trial in the State Court."

These authorities certainly should demonstrate that the Fourteenth Amendment leaves to a state the selection as to

the tribunal by which the issue of fact as to the voluntariliness of a confession shall be determined, so long as such state provides for a judicial determination thereof. Likewise, under State practice, it was the duty of petitioner Ashcraft, if the Trial Court failed to accurately submit his theory and defense, to have submitted special requests, correctly setting forth his defensive theory.

Hosiery & Yarn Co. v. *Napper*, 124 Tenn. 155.

For the reasons stated, the respondent respectfully insists that the introduction of the confessions of the petitioners did not deprive them of due process of law, and that the petition for certiorari should be denied.

But before closing however, counsel for the respondent realizes that this Court is not concerned with his moral views, but he feels it his duty to state to the Court that should the conviction of petitioner Ashcraft be reversed by this Court, counsel's sense of justice would rebel at an affirmance of the judgment of the lower Court against Ware. Ware is a youthful negro, illiterate, and of rather low mentality, under the record. He was but a pliant tool in the hands of Ashcraft, and but for the suggestion and promise of reward upon the part of Ashcraft, Ware would not have even contemplated the commission of the homicide for which he stands convicted. Ashcraft was the guiding spirit in the entire matter, and Ware the nearly inanimate tool by which the actual homicide was accomplished, and although from a legal standpoint there may appear in the transcript no sound reason for the reversal of the judgment of the Supreme Court of Tennessee against Ware, yet if upon the whole record this Court shall be of the opinion that Ashcraft was denied due process of law by the introduction of his confession, then the respondent respectfully suggests that to accomplish complete justice, the judgment should

likewise be reversed as against Ware, in order that the greater criminal may not escape, while the lesser pay the penalty.

Respectfully submitted,

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I hereby certify that I have mailed a copy of this Brief to Messrs. James F. Bickers and Grover N. McCormick, Commerce Title Building, Memphis, Tennessee, Attorneys for Petitioners.

NAT TIPTON.

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